Supreme Court, U.S.
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No. 02-462

IN THE

Supreme Court of the United States

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Petitioner,

v.

DAVID C. COOPER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Introduction

In its Petition for Certiorari, Petitioner suggests that this Court should grant discretionary review and overturn an unpublished memorandum decision of the Ninth Circuit Court of Appeals. Petitioner suggests that review is appropriate because the Ninth Circuit's decision creates a conflict of law amongst the circuit courts and is inconsistent with the statutory language of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.*[1] As is set forth more fully below, Petitioner's arguments are without merit, and there is no good reason for this Court to exercise its discretionary review of the memorandum decision of the Ninth Circuit Court of Appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

Relevant Material Facts

As Petitioner correctly points out, the case presents the issue of whether ERISA continues to govern a claim for wrongful denial of disability insurance benefits even if there is no employee benefit plan at the time the benefit determination is made. The Ninth Circuit ruled that state law claims for wrongful denial of insurance benefits are not preempted by ERISA once the relevant employer sponsored plan has been terminated. In reaching this decision, the circuit court relied on the following facts.

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1. Petitioner also argues that the lower court's decision is inconsistent with prior decisions of the Ninth Circuit Court of Appeals and is contrary to the factual findings made by the district court. Neither of these issues is of the type that merit review by this Court. *See* Rule 10(a), United States Supreme Court Rules of Practice.

Respondent, David Cooper, was the named insured under an individual disability income policy issued by Provident. (App. 9a). The district court concluded that the individual disability insurance policy was part of an employer sponsored plan. (App. 9a).[2] In November of 1995, Mr. Cooper's employer terminated the ERISA plan. (App. 8a). After his employer terminated its involvement in the benefit plan, Mr. Cooper continued his disability insurance coverage by making the premium payments himself. (App. 43a).

In September of 1995, Mr. Cooper filed a claim for benefits under his disability insurance policy. (App. 10a). In December of 1996, Mr. Cooper filed a second claim for benefits under the disability coverage. (App. 10a). Provident treated Mr. Cooper's second claim for benefits as a request to reopen his initial claim. (App. 10a). In June of 1997 (over a year and a half after the employer terminated the plan), Provident responded to Mr. Cooper's claim. (App. 10a). At that time, the company refused to pay Mr. Cooper's claim for disability benefits. (App. 10a).

The Ninth Circuit's Memorandum Decision Has No Precedential Effect; Therefore It Cannot Create A Conflict Of Authority Amongst The Circuit Courts

In its Petition for Writ of Certiorari, Petitioner argues that the Ninth Circuit's decision creates an irreconcilable conflict with rulings from other circuit courts. Noticeably absent from the Petition, however, is any reference to the fact that the Ninth Circuit's decision was designated as a memorandum disposition. (App. 3a). Under the Rules of the

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2. The Ninth Circuit assumed without deciding that Mr. Cooper's insurance policy was part of an ERISA plan. (App. 4a).

Ninth Circuit, memorandum decisions of the court are not binding precedent and may not be cited except as relevant under the doctrines of law of the case, res judicata, and collateral estoppel. *See* Rule 36-3, Ninth Circuit Rules. Insofar as the Ninth Circuit's decision is not binding precedent, by definition, it cannot create a conflict with any ruling by any other court.

The Ninth Circuit's Memorandum Decision Is Consistent With Prior Rulings Of This Court

The issue presented by the Petition is whether ERISA preempts state law claims which arise *after* an employer sponsored plan has been terminated. While this Court has never addressed this specific issue, the Ninth Circuit's decision in the present case is consistent with the rationale of this Court's decisions interpreting the preemption provision of ERISA.

ERISA's preemption provision is set forth in 29 U.S.C. § 1144(a). The statute provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all state laws insofar as they may now or hereafter relate to any Employee Benefit Plan described in § 1003(a) of this title. . . .

In *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987), the Court explained the purpose underlying the preemption provision of ERISA. In the *Fort Halifax* case, the Court concluded that state law claims for severance pay were not preempted by ERISA. One of the bases of the Court's decision

in *Fort Halifax* was that preemption of the state law at issue would not have furthered the purpose underlying the preemption provision of ERISA. *Id.* at 8. The Court in *Fort Halifax* explained that the problem that ERISA's preemption provision was intended to address was the need to "eliminate the threat of conflicting and inconsistent state and local regulation." *Id.* at 9 quoting 120 Cong. Rec. 29197 (1974). Thus, the Court concluded that preemption would only be appropriate if the state law interfered with an employer's ongoing administration of an employee benefit plan.

> The purposes of ERISA's preemption provision make clear that the Maine statute in no way raises the types of concerns that prompted preemption. Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress preempted state laws relating to *plans*, rather than simply to *benefits*. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

Id. at 11-12 (emphasis in the original).

In addressing whether ERISA was applicable to Mr. Cooper's state law claims, the Ninth Circuit reasoned that a state law claim does not "relate to" an employee benefit plan if the state law claim arises after the employer has

terminated its ongoing involvement in the plan. The court stated:

> Accordingly, even if there had been an ERISA plan in existence when the company was still functioning, there was no ERISA plan after it ceased doing business and Cooper continued independently to make full payment of premiums. The case is therefore controlled by our decision in *Waks v. Empire Blue Cross/Blue Shield*, 263 F.3d 872, 874 (9th Cir. 2001).

(App. 4a).

In *Waks*, the Ninth Circuit addressed the issue of whether ERISA preempted a claim filed by a person who was insured under an individual health policy which had been converted from an ERISA governed group health plan. The Ninth Circuit in *Waks* held that such conversion coverages are not subject to ERISA preemption. *Waks*, 263 F.3d at 875. Central to the Ninth Circuit's decision in *Waks* was the rationale set forth by this Court in *Fort Halifax* that ERISA preemption is not applicable unless there is ongoing administrative involvement by the employer.

> We conclude that claims arising under a converted individual policy are not "related to" an ERISA plan for purposes of ERISA preemption. This conclusion is consistent not only with the words, but also the purposes of the statute. A converted policy is created when an ERISA plan participant leaves the plan and obtains a new, separate, individual policy based on conversion rights contained in the ERISA plan. The contract under the converted policy is directly between the insurer and the insured. It is independent of the

> ERISA plan and does not place any burdens on the plan administrator or the plan. There are also no relevant administrative actions by the employer. *See Fort Halifax*, 482 U.S. at 16 ("It would make no sense for preemption to clear the way for exclusive federal regulation, for there would be nothing to regulate.").

Id. at 875-76.

The First Circuit has also concluded that this Court's decision in *Fort Halifax* requires the conclusion that ERISA preemption cannot exist unless a state law claim impacts an employer's ongoing administration of an ERISA plan. *See Demars v. Cigna Corp.*, 173 F.3d 443 (1st Cir. 1999). In *Demars*, the plaintiff had converted coverage under a group disability policy to coverage under an individual policy after she ceased working for her employer. The First Circuit in *Demars* held that the plaintiff's claim under her individual policy was not preempted by ERISA. *Id.* at 450. The First Circuit in *Demars* reasoned that the congressional purpose of ERISA (protecting employers from conflicting state regulation) is not implicated in claims arising out of conversion coverages because they do not impact the employer's ongoing administration of an employee benefit plan.

> The uniformity of regulations concern [of ERISA] is equally attenuated. While conversion policies like Demars' undoubtedly impose an administrative burden, the burden lies on the insurers who provide the policy, not on the former employer. As [the Supreme Court in] *Fort Halifax* noted, 'Congress intended preemption to afford employers the advantages of a uniform set of administrative

> procedures governed by a single set of regulations. This concern only arises with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation'. Thus, an employee benefit may be considered a plan for purposes of ERISA only if it involves the undertaking of continuing administrative and financial obligations by the employer. Under this analysis, conversion policies are not ERISA plans because employers do not bear any administrative or financial responsibility for them.

Id. at 446 (citations omitted).

Like the Ninth Circuit in *Waks*, the First Circuit in *Demars* focused on this Court's decision in *Fort Halifax* to distill the principle underlying the "relate to" requirement of ERISA preemption.

> What matters for ERISA purposes is . . . the nature of employer's ongoing administrative and financial ties to the policy. If no such ties exist, the policy should not be subject to ERISA regulation.

Demars, 173 F.3d at 450. In the present case, as in *Waks* and *Demars*, Mr. Cooper's former employer had no administrative or financial ties to his insurance coverage at the time of the conduct giving rise to Mr. Cooper's state law claims. Rather, the administrative and financial burden of providing insurance coverage for Mr. Cooper's claim for benefits rested solely with Provident. There was no financial burden on Mr. Cooper's former employer because any benefits due

under the policy were owed by Provident. Moreover, there was no administrative burden on Mr. Cooper's former employer insofar as the employer had terminated its relationship with the purported employee benefit plan long before Provident reached its decision to deny Mr. Cooper's claim. Accordingly, because Mr. Cooper's employer had severed all ties to his disability insurance coverage prior to the time that Provident reached its determination to deny his claim, therefore, any state law claim for wrongful denial of benefits did not "relate to" the then defunct ERISA plan.

Conclusion

Rule 10 of the Supreme Court Rules sets forth the considerations governing review by way of certiorari. The rule is clear that a Petition for Writ of Certiorari will be granted only for compelling reasons. While these reasons include a decision by a United States Court of Appeals which conflicts with a decision of another circuit court, under the Ninth Circuit's rules, the court's memorandum decision in the present case is not binding authority on any person other than Mr. Cooper and Provident. Accordingly, the circuit court's decision cannot create any conflict with decisions of any other court. Moreover, because the memorandum decision is not applicable to any person other than Mr. Cooper and Provident, there is no compelling reason for this Court to exercise its discretionary review of this matter.

For the foregoing reasons, Respondent respectfully requests that this honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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